Nos. 06-969 and 06-970

# In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
*Appellant,*

v.

WISCONSIN RIGHT TO LIFE, INC.,
*Appellee.*

SENATOR JOHN MCCAIN, ET AL.,
*Intervenor-Appellants,*

v.

WISCONSIN RIGHT TO LIFE, INC.,
*Appellee.*

*ON APPEALS*
*FROM THE UNITED STATES DISTRICT COURT*
*FOR THE DISTRICT OF COLUMBIA*

## BRIEF OF A COALITION OF PUBLIC CHARITIES, AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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## INTEREST OF THE *AMICI CURIAE*

*Amici*[1] are public charities, tax-exempt under section 501(c)(3) of the Internal Revenue Code. Individual organizations' Statements of Interest are presented below.

### A. OMB Watch

OMB Watch is the operating name of Focus Project, Inc., a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code. Its goal is to promote government accountability and citizen participation in public issues. It is guided by the belief that improving access to governmental decision-makers and energizing citizen participation will lead to a more just, equitable and accountable government, and a stronger society.

OMB Watch's primary focus areas are the federal budget; nonprofit advocacy; government transparency and accountability; and legislation and regulations impacting economic justice, health, safety, and the environment. OMB Watch has a 17-person staff and a $1.7 million annual budget. On this modest budget it has had a significant impact. Over the years, it has played a leadership role on important federal policies, including regulatory reform measures, balanced budget constitutional amendments, and the estate tax. Roughly

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[1] This brief is filed with the consent of all parties, as indicated by letters of consent filed with the Court. No counsel for a party authored this brief, in whole or in part. No person or entity other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ninety percent of its revenue comes from foundations, often in the form of project grants.

In order to be effective, OMB Watch must react quickly and flexibly to emerging policy debates. Changing congressional goals require it to shift from planned agenda items to unplanned ones. It often works through coalitions, and it places a high value on bridging the gap between Washington and the grassroots level, and energizing citizens at the community level. The coalitions OMB Watch leads connect it to scores of umbrella groups and national membership associations. They, in turn, distribute OMB Watch's materials to thousands of their respective constituents around the country.

When choosing how it will communicate, OMB Watch along with its coalition partners must select means of communication that are suitable to the task. For example, if the House of Representatives or the Senate unexpectedly schedules a vote of importance, time does not always allow for a direct mail or telephone campaign. Broadcast advertising may be the only way to influence the debate.

OMB Watch and its coalition partners of nonprofit organizations take advantage of free and paid media efforts to spread their messages. If they cannot afford to pay for television or radio advertisements, they rely on the broadcasters' willingness to provide unpaid access. Access is provided consistent with the broadcasters' legal obligation to operate in the public interest. OMB Watch and its coalition partners also hold press conferences or other informational events, some of which are covered by C-SPAN or local public interest channels.

As a public charity, OMB Watch does not and cannot use these occasions to intervene in political campaigns.

Nevertheless, in the course of a typical broadcast there will be regular references to clearly identified officeholders who may also be candidates for federal office. Indeed, it is impossible for OMB Watch to avoid referring to federal candidates, given that the key decision-makers on the issues it seeks to affect are almost always qualified as candidates under federal campaign finance law. Almost invariably, the sponsor of the legislation discussed or the executive who has initiated the policy debate is also a federal candidate.

Because OMB Watch is a public charity, it does not have the option of speaking through an affiliated political committee. As a result, due to the electioneering communication restrictions, it has only two choices: stay silent or risk prosecution.

**B. Independent Sector**

Independent Sector ("IS"), a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code, is the leadership forum for charities, foundations, and corporate giving programs committed to advancing the common good in America and around the world. Its nonpartisan coalition leads, strengthens, and mobilizes the charitable community in order to fulfill its vision of a just and inclusive society of active citizens, vibrant communities, effective institutions, and healthy democracy. Independent Sector's membership of 575 organizations collectively represents tens of thousands of charitable groups serving every cause in every region of the country, as well as millions of donors and volunteers.

IS serves as the premier meeting ground for the leaders of America's charitable and philanthropic sector. Since its founding in 1980, IS has sponsored ground-breaking

research; fought for public policies that support a dynamic, independent sector; and created resources so staff, boards, and volunteers can improve their organizations and better serve their communities. IS fulfills its mission by convening sector leaders to work together on key issues; promoting policies that enable the charitable community to engage with public officials on a nonpartisan basis; supporting the development and dissemination of strategies to strengthen volunteering, voting, giving, and other forms of citizen engagement; encouraging the sector to meet the highest standards of ethical practice and effectiveness; and serving as the voice of the charitable community to the media, government, business, and international voluntary communities.

IS is currently engaged in a broad range of public policy issues ranging from federal and state regulation of charitable organizations, federal tax and spending policies, federal tax incentives for charitable giving, and protecting the advocacy rights of nonprofit organizations. The majority of its members are 501(c)(3) organizations that may not participate in, or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, but these organizations frequently engage in advocacy efforts to inform public policy debates on issues that affect their constituents' and their ability to fulfill their charitable purposes.

These advocacy efforts at times include communications with elected officials in their current capacity as representatives of the people, whether or not they are, at the same time, candidates for federal office. Organizations cannot predict or control the timing of when an issue will be considered by public officials. Some of IS's member organizations, for example, are concerned about the possibility of estate tax repeal because of the

negative effect that would have on charitable giving. Their ability to encourage the public to contact their elected officials about a pending vote on the estate tax would be curtailed if the vote was scheduled during an election period. IS members may find it necessary to run ads asking a local official to keep a particular shelter open, even though the official is also a candidate for federal office. IS members have called on the public to contact their congressional representatives about pending votes that affect the funding and eligibility requirements for specific government programs related to charitable purposes ranging from human services to health to the arts.[2]

## SUMMARY OF ARGUMENT

The electioneering communication restriction of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 166 Stat. 81, 91 (codified at 2 U.S.C. § 441b(c)), is overbroad as applied to organizations granted tax exemption by the Internal Revenue Service ("IRS") under section 501(c)(3) of the Internal Revenue Code ("the Code"). Sections 203 and 204 of BCRA were designed to prevent only "sham issue ads," which are "the functional equivalent of express advocacy." *McConnell v. FEC*, 540 U.S. 93, 185, 206 (2003). Organizations such as *amici*, organized and operating under section 501(c)(3) of the Code, are already subject to severe restrictions, enforced by the Code and United States Treasury regulations, preventing them from intervening in political campaigns. In light of these restrictions, the

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[2] Additional Interests of *Amici* are included in the Appendix to this brief.

electioneering communication prohibition serves no compelling state interest when applied to charitable organizations. Moreover, section 501(c)(3) organizations do not enjoy the alternative of establishing federally-registered political committees ("PACs") to speak freely within the electioneering communication period, an option this Court found critical when rejecting a facial challenge to the electioneering communication restriction on corporate speech. *See id.* at 204 (citing *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)).

When considering when the First Amendment requires an as-applied exception to the electioneering communication restrictions, this Court should consider and rely on the unique restrictions on section 501(c)(3) organizations, already strictly enforced by the IRS, that make it impossible for them to the sponsor sham issue ads targeted by BCRA, and permit them to speak freely so long as they honor the boundaries mandated by their tax-exempt status.

### C. Electioneering Restrictions Are Too Broad

#### 1. Electioneering Communication Prohibition Restricts Communications by 501(c)(3) Organizations

Among other significant changes in federal election law, BCRA amended 2 U.S.C. § 441b to prohibit corporations and labor unions from making a payment for an "electioneering communication." 2 U.S.C. § 441b(b)(2). The prohibition applies to all corporations, including 501(c)(3) organizations that incorporate solely for liability purposes. It bars electioneering communications by charitable corporations even when

paid for with funds contributed only by individuals. *See id.* § 441b(c)(2), (6).

The definition of an "electioneering communication" includes "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office," that is made 30 days before a primary election, or 60 days before a general election, and that can be received by 50,000 or more persons in the relevant district or state. *Id.* § 434(f)(3)(A), (C).[3]

For candidates for President and Vice President, the 30-day electioneering communication period before the primary election will differ from state to state, due to the presidential primary schedule that begins with the Iowa caucuses on January 14, 2008; the electioneering communication period also includes the 30 days before each national political party convention and the days of the convention itself. *See* 11 C.F.R. § 100.29(a)(3)(ii)(A) (2007). Though the primary dates are not yet finalized for either the Democratic or Republican parties, the presidential primary calendar will likely result in an almost continual electioneering communication blackout period for the nationwide reference of presidential candidates between December 15, 2007, and the end of each party's national convention.

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[3] The statutory scheme only includes the "received by 50,000 persons" limitation for electioneering communications that reference a candidate for Senator or Representative to Congress; the Federal Election Commission, by regulation, has also applied this limitation to communications that reference candidates for President or Vice President. *See* 11 C.F.R. § 100.29(a)(3)(ii) (2007).

The definition of "clearly identified" is defined, by Federal Election Commission ("FEC") regulation, to include a candidate's name or photograph; it also includes communications in which "the identify of the candidate is otherwise apparent," including terms such as the term "your Congressman." 11 C.F.R. § 100.29(b)(2). Surprisingly, it even includes a reference to a popular name of legislation identified by the sponsors' name. *See* Electioneering Communications, 67 Fed. Reg. 65,190, 65,200-201 (Oct. 23, 2002). Thus, a reference to "McCain-Feingold," made on television or radio within the electioneering communication period, is considered an "electioneering communication" under BCRA and the promulgated regulations.

In its implementing regulations, the FEC limited the definition of an electioneering communication to a communication "disseminated for a fee." The FEC explained that BCRA's "legislative history abundantly documents that paid advertisements were the focus of the electioneering communication provisions." 67 Fed. Reg. at 65,192. However, that limitation was challenged in the United States District Court for the District of Columbia, which found that the exception was inconsistent with the plain meaning of the statute. *Shays v. FEC*, 337 F. Supp. 2d 28, 129 (D.D.C. 2004), *aff'd*, *Shays v. FEC*, 414 F.3d 76, 109 (D.C. Cir. 2005). Subsequently, the FEC revised its regulation to remove this exception. *See* Electioneering Communications, 70 Fed. Reg. 75,713, 75,715 (Dec. 21, 2005).

The original electioneering communication regulations also contained an exception for any communication that is "paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986." 67 Fed. Reg. at 65,200. The FEC reasoned:

> Section 501(c)(3) organizations are barred as a matter of law from being involved in partisan political activity. The Commission believes the purpose of BCRA is not served by discouraging such charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested, and which such organizations, by their very nature, do not do.

*Id.* The FEC noted: "Should the Internal Revenue Service determine, under its own standards for enforcing the tax code, that an organization has acted outside its 501(c)(3) status, the organization would be open to complaints that it has violated or is violating Title II of BCRA." *Id.* The FEC also pledged to work with the IRS to promulgate mutually consistent rules and regulations, as they are required to do by statutory mandate. *See* 2 U.S.C. § 438(f).

This regulatory exception was also challenged in *Shays v. FEC*; the court held that it violated the Administrative Procedures Act. *See Shays*, 337 F. Supp. 2d at 127. The FEC thereafter revised the electioneering communication definition to remove this exception for charitable organizations. *See* 70 Fed. Reg. at 75,714.

To provide an avenue for the broadcast of genuine nonpartisan lobbying communications, a coalition of organizations described in section 501(c) of the Code, including OMB Watch, filed with the FEC a Petition for Rulemaking on February 16, 2006. The Petition requested that the FEC revise 11 C.F.R. § 100.29 to permit "grassroots lobbying" communications. The petition requested an exception from the "electioneering

communication" definition, based on the following six factors:

> (1) "The 'clearly identified federal candidate' is an incumbent public officeholder;" (2) "The communication exclusively discusses a particular current legislative or executive branch matter;" (3) "The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so;" (4) "If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter;" (5) "The communication does not refer to an election, the candidate's candidacy, or a political party;" and (6) "The communication does not refer to the candidate's character, qualifications or fitness for office."

Exception for Certain "Grassroots Lobbying" Communications From the Definition of "Electioneering Communication," 71 Fed. Reg. 52,295, 52,295 (Sep. 5, 2006).[4] On August 29, 2006, the FEC voted to decline the petitioners' request, noting that the litigation in the case presently before this Court "may provide the Commission

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[4] *Amici* believe that FEC regulatory action could alleviate but not cure the constitutional injury occasioned by the overbreadth of the electioneering communication ban as applied to charitable organizations.

with guidance on whether and how the Commission should exercise its discretion in this area." *Id.* at 52,296.

As a result, the current statutory and regulatory regime provides no avenue for a section 501(c)(3) organization that wishes to reference a federal candidate on radio or television during the electioneering communication period to do so. It matters not that the content is entirely neutral and nonpartisan and devoid of electoral content. It matters not that the organization is statutorily forbidden to attempt to influence the election.[5] And it matters not that the organization's communication is broadcast for free as a public service announcement or on public access television or radio.

The electioneering communication restriction, as enacted by Congress, prohibits a section 501(c)(3) organization from airing a grassroots lobbying communication that asks listeners to contact their Member of Congress, even if the communication says nothing about the Member's position on the issue. The restriction requires a public charity sponsoring a C-Span nationally televised educational conference to instruct speakers that they may not mention a federal officeholder or candidate, or even the phrase "your Congressman," if the conference will be in the 30 days before any congressional primary or in the 60 days before the general election. The restriction prohibits a church from broadcasting a service in which a candidate may be in attendance during the electioneering communication period before that candidate's election.

Indeed, the electioneering communication restriction goes so far as to prevent a section 501(c)(3) organization

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[5] *See* section D, *infra*.

from holding a symposium, nationally televised on C-Span, on the very topic of this brief. BCRA is commonly known as the "McCain-Feingold" legislation. Senator McCain is a candidate for nomination for President from the Republican Party. Due to the series of presidential nominating contests, the electioneering communication period for the primary elections will be in place somewhere in the country almost continuously beginning on December 15, 2007. These restrictions do not end until the day after the Republican National Convention, the very day the sixty-day period before the general election begins. Thus, an educational institution's discussion of this very case must wait until after November 4, 2008, if it will be carried nationally via a public access television or radio station.

The electioneering communication restriction prevents wide swaths of educational and nonpartisan speech by section 501(c)(3) organizations. Against the powerful First Amendment interests of these organizations, the absolute ban on corporate electioneering communications cannot stand.

### 2. Nonprofit Lobbying Is Protected under the First Amendment

"Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. This right is "implicit in '[t]he very idea of government, republican in form.'" *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). This Court has consistently held that the right to petition applies equally to all branches of government. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

> For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.

1 Blackstone's Commentaries editor's app. at 297 (St. George Tucker ed., Philadelphia, Birch & Small 1803), *quoted in New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Goldberg, J., concurring in result).

The First Amendment protects the right of corporations, as well as individuals, to petition the legislature through direct or grassroots lobbying. The discussion of government affairs "is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). "The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990). Corporations also "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 8 (1986) (quoting *Bellotti*, 435 U.S. at 783).

The term "grassroots lobbying" is defined by regulation as "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof." Treas. Reg. § 56.4911-2(b)(2)(i) (2007). According to a survey of over 1,700 section

501(c)(3) organizations conducted by OMB Watch in 2002, seventy-eight percent of section 501(c)(3) organizations participate in policy debates through grassroots lobbying. The lobbying causes championed by section 501(c)(3) organizations are used to bring light to otherwise little-known issues, and to mobilize the public on issues of national public importance.

The grassroots lobbying efforts conducted by section 501(c)(3) organizations fall squarely into the protection offered by the First Amendment. These lobbying campaigns are pure speech, directed at legislative officials and the public, with the sole purpose of affecting the shape and direction of public policy. These efforts are vital to a well-functioning democracy.[6]

Often lobbying efforts are undertaken in response to unanticipated legislative developments. These campaigns depend on speed and timeliness; their timing is completely dependent on when legislative issues arise. Section 501(c)(3) organizations cannot simply put their efforts on hold during election years; the rolling primary calendar means that nationwide lobbying efforts are forbidden for much of the year. Moreover, if lobbying efforts cannot be unveiled contemporaneously with the timing of the legislative vote at issue, no matter when that vote occurs,

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[6] "[The right of petition] would seem unnecessary to be expressly provided for in a republican government, since . . . [i]t is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen." 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 645 (5th ed. 1891).

the right to petition will be little more than an academic privilege.[7]

As noted above, in the wake of *Shays v. FEC* and the resulting revision of the electioneering communication regulations, section 501(c)(3) organizations are limited not just with regard to their paid lobbying communications, but also for completely dispassionate educational programming that is broadcast for free on public access television or radio. These activities were not the focus of Congress when enacting BCRA, nor do they bear any threat of influencing federal elections. And yet the broad scope of 2 U.S.C. § 441b(c) restricts these activities just as completely. This prohibition on speech is not justified by the nonexistent threat of electoral influence posed by section 501(c)(3) organizations and the special statutory and regulatory restrictions imposed on them as a result of their tax status.

*Amici* are not completely silenced during the electioneering communication blackout periods. A corporation, including a charitable organization, may refer to a federal candidate in direct mail, over the telephone, on the Internet or in a pamphlet during a blackout period. These avenues of communication, however, are often more costly and less effective than broadcast communications. *Amici* are also concerned that Congress

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[7] Indeed, legislators and lobbyists can easily take advantage of the blackout to enact legislation hostile to nonprofit organizations' interests, knowing that the nonprofit community will have difficulty mobilizing public opposition.

may extend, as several states already have,[8] the electioneering communication ban to other forms of communication. If the electioneering ban can be constitutionally applied to the broadcast communications of charitable organizations, there is no apparent reason why other means of communication would be entitled to greater constitutional protection.

### D. Section 501(c)(3) Organizations Cannot Intervene in Political Campaigns

#### 1. Section 501(c)(3) Organizations Are Prevented From Directly Intervening in Elections

Section 501(c)(3) of the Code requires that organizations described there "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3); *see also id.* § 170(c)(2)(D). This prohibition is absolute; the IRS does not permit section 501(c)(3) organizations from engaging in any political activity, even a *de minimis* amount.

Any violation of this prohibition can result in an organization losing its tax-exempt status entirely. An

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[8] *See* ALASKA STAT. § 15.13.400(5); COLO. CONST. ART. XXVIII, § 2(7); FL. STAT. § 106.011(18); HI. CODE R. § 11-207.6; IDAHO CODE ANN. § 67-6602(f); 10 ILL. COMP. STAT. 5/9-1.14; N.C. GEN. STAT. § 163-278.90(2); OKLA. STAT. tit. 74, § 257:1-1-2; WASH. REV. CODE § 42.17.020(20); W. VA. CODE § 3-8-1A(10); *see also* GUAM CODE ANN. tit. 3, § 19112.1.

organization in violation of this restriction is also subject to fines; so is any individual manager of the organization who engaged in the activity knowing it was a political expenditure. *Id.* § 4955. Moreover, the IRS also has the authority, in the case of "flagrant" political campaign activity, to seek an injunction in federal court to prevent future political expenditures. *Id.* § 7409.

Section 501(c)(3) organizations must apply to the IRS for approval of their tax-exempt status. *See* I.R.C. § 508(a). As part of the application process, they must establish to the IRS's satisfaction that they can meet both the organizational and the operational limitations of section 501(c)(3), including the prohibition on political activity. *See generally* Treas. Reg. § 1.501(c)(3)-1.

The definition of political intervention is extremely broad. Communications that do not "expressly advocate the election or defeat of a clearly identified candidate," *see Buckley v. Valeo*, 424 U.S. 1, 80 (1976), may still be found to be political intervention; the IRS examines "all the facts and circumstances" surrounding the communication to determine whether it is political in nature. Treas. Reg. § 1.527-2(c)(1); *see, e.g., Christian Echoes Nat. Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

Section 501(c)(3) organizations are also strictly limited in their total amount of grassroots lobbying. "No substantial part" of the activities of a section 501(c)(3) organization may be "carrying on propaganda, or otherwise attempting, to influence legislation." I.R.C. § 501(c)(3). The actual amount varies, depending on whether an organization has elected a specific expenditure test, or whether it is subject only to the baseline "substantial part" test. *See id.* § 501(h); *id.* § 4911(c);

Treas. Reg. § 1.501(h)-1(a). Lobbying in excess of the prescribed limits can result in a fine for those organizations subject to the expenditure test, *see* I.R.C. § 4911, and revocation of the organization's tax-exempt status.[9]

The IRS has focused extensively on the political intervention prohibition in recent years, both by providing an increased level of guidance and by strengthening its enforcement activities. In December 2003, the IRS issued a revenue ruling that clarified, through examples, when a communication would be considered to be political intervention.[10] The revenue ruling included six factors that "tend to show that an advocacy communication on a public policy" is, in fact, a political communication:

> a) The communication identifies a candidate for public office;
>
> b) The timing of the communication coincides with an electoral campaign;
>
> c) The communication targets voters in a particular election;

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[9] Private foundations are even more restricted; they cannot engage in any lobbying activities at all. *See id.* § 4945(d)(1).

[10] In fact, this revenue ruling technically addressed only when the activities of a section 501(c)(4), (5), or (6) organization would be deemed political intervention; these organizations may engage in limited amounts of political activity, subject to tax. *See id.* § 527(f). However, for most purposes, the IRS considers the inquiry to be the same. *See* I.R.S. Priv. Ltr. Rul. 96-52-026 (Dec. 27, 1996). Thus, this revenue ruling is considered instructive on the political prohibition on section 501(c)(3) organizations.

d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;

e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and

f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Rev. Rul. 2004-6, 2004-1 C.B. 328. More recently, in February 2006 the IRS released a fact sheet with more examples of what the IRS does and does not consider to be political intervention. *See* I.R.S. News Release IR-2006-36 (Feb. 24, 2006).

At the same time, the IRS released the initial results of its Political Activities Compliance Initiative. Through this process, the IRS conducted one hundred thirty-two field examinations of section 501(c)(3) organizations suspected of engaging in prohibited political campaign activity. The IRS also pledged "to provide more and better guidance and move quickly to address prohibited activities." *See id.*

It is now clear that the IRS is taking strong action to both clarify what constituted prohibited political campaign activity, and to take enforcement action against those organizations that violate the prohibition. As a result, section 501(c)(3) status – now more than ever – is an effective barrier to political campaign activity.

### 2. Section 501(c)(3) Organizations Are Prevented From Operating PACs

When this Court upheld 2 U.S.C. § 441b(c) against a facial challenge, it noted: "in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *See McConnell*, 540 U.S. at 206. The Court was referring to the ability of a corporations or labor union to establish a federally-registered separate segregated fund (a "PAC"), into which individual funds can be solicited from a corporation's stockholders and executive and administrative personnel, or from a labor union's members. *See* 2 U.S.C. § 441b(2). The ability of a corporation or labor union to engage in some political speech, albeit through constrained channels, was crucial to the Court's holding; it was also an important factor when the Court found that the state of Michigan's ban on corporate political contributions was narrowly tailored. *See Austin*, 494 U.S. at 660 (noting that "the Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds"). Indeed, even Appellant defends the absolute prohibition on electioneering communications by corporations by explaining: "A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for electioneering communications in unlimited amounts from that fund." (Appellant Br. 7).

Section 501(c)(3) organizations, due to the prohibition on political campaign activity, are prohibited from taking advantage of this option. While the IRS has never made a formal ruling on this precise issue, the statutory and regulatory regime prevents a section 501(c)(3)

organization from engaging in political activity, including creating a subsidiary political account. Informally, the IRS has so advised its agents and the regulated community. *See* J.E. Kindell & J.F. Reilly, *Election Year Issues*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM 335, 344 (2002) (advising that "an IRC 501(c)(3) organization may not . . . establish political action committees (PACs)").

Moreover, even if a section 501(c)(3) organization could form a political committee account solely to use as a safe harbor, it would ordinarily have extremely few individuals to solicit for contributions: there are no stockholders; the number of executive and administrative personnel are usually small in number; and section 501(c)(3) organizations, unlike their brethren organized under section 501(c)(4), (5), or (6), are rarely organized as membership organizations. Thus, even if there were not a strong legal prohibition to the use of a separate segregated fund, there is an equally strong practical barrier.

The result is that section 501(c)(3) organizations are singled out for silence. Only these organizations, which are prohibited from partisan political intervention as a condition of their tax status, are completely barred from speaking during the electioneering communication periods. The irony could not be greater, because section 501(c)(3) organizations do not pose any of the risks justifying the electioneering communication restrictions on corporate speech.

### E. Section 501(c)(3) Organizations Pose No Risk of Corruption or Distortion

This Court has only upheld the regulation of freedom of speech in the political sphere if justified by one of two compelling interests. The first is "corruption or the appearance of corruption," *McConnell*, 540 U.S. at 179; the second is "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *See Austin*, 494 U.S. at 660, *quoted in McConnell*, 540 U.S. at 205. Neither of these justifications can justify onerous restrictions on the lobbying and educational activities of section 501(c)(3) organizations.

Independent political expenditures do not "appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Buckley*, 424 U.S. at 46. The lobbying and educational efforts of section 501(c)(3) organizations, cabined within the IRS's strict prohibition against political campaign activity, pose even less of a danger. Moreover, because of the existing restrictions on coordinated communications, a section 501(c)(3) organization cannot distribute lobbying or educational communications within the electioneering communication period that reference a federal candidate "in cooperation, consultation, or concert," with either that candidate or a political party. *See* 2 U.S.C. § 441a(a)(7); 11 C.F.R. § 109.21.[11] Simply put, there is no legitimate

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[11] No candidate or political party may request or suggest the communication; may be materially involved in the communication; may have a substantial discussion with the sponsor regarding the communication; or may use a common vendor or former employee to coordinate the communication. *See id.*

risk of corruption or the appearance thereof from the educational and lobbying activities of section 501(c)(3) organizations.

Nor does the lobbying and educational activity of section 501(c)(3) organizations raise "the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986). Section 501(c)(3) organizations cannot accumulate commercial wealth to dominate the political debate; their resources, by law, must be devoted to public purposes. They do not "exercise control over large aggregations of capitol," *US. V. UAW-CIO*, 352 U.S. 567, 585 (1957); nor do they hold "substantial aggregations of wealth amassed by the special advantages which go to the corporate form of organization." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982). Quite to the contrary, section 501(c)(3) organizations often serve as a counterweight to the immense resources that corporations expend to influence government policy.

Indeed, there is no evidence – none at all – to suggest that genuine section 501(c)(3) lobbying or educational activities are a vehicle for "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Austin*, 494 U.S. at 660. Unlike "sham issue ads," which this Court found to be the "functional equivalent" of express advocacy, legitimate lobbying efforts are barred, by statute and IRS regulation, from being "intended to influence the voters' decisions." *McConnell*, 540 U.S. at 206. There is no evidence that section 501(c)(3) organizations produce the "bogus issue advertising" that was the focus of the electioneering communication restriction. *See id.* at 129. The evidence Congress compiled when passing BCRA, on

which this Court relied heavily in upholding the electioneering communication restrictions, never referenced section 501(c)(3) organizations. *See id.* at 126-32. More recently, the FEC found no evidence during its rulemakings that suggest sham issue ads sponsored by 501(c)(3) organizations are a factor. *See* 70 Fed. Reg. at 75, 714; 67 Fed. Reg. at 65,200.

### F. The Court Should Permit Section 501(c)(3) Organizations To Operate Freely within the Limits of their Tax Structure

This Court, when upholding the electioneering communication restriction against a facial challenge, "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell*, 540 U.S. at 206 n.88. The Court is now faced with a group of organizations that, because of their tax status and rigorous IRS oversight, can only sponsor "genuine issue ads." When considering the contours of a First Amendment as-applied exception to the electioneering communication restriction, this Court should rely on that tax status to allow greater flexibility for section 501(c)(3) organizations.

There is precedent, in both the Court's interpretation of the corporate ban on expenditures and in the FEC's regulations, for reliance on tax status for increased First Amendment protection. Furthermore, the FEC has previously recognized that the political restrictions which are a condition of section 501(c)(3) status allow greater freedom for section 501(c)(3) organizations without the risk that they will use that freedom for political purposes.

In the case *FEC v. Massachusetts Citizens for Life, Inc.*, this Court confronted an as-applied challenge to the

statutory prohibition on corporate independent expenditures. It ruled that the First Amendment did not permit the prohibition to extend to the appellant. "We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace. . . . [T]hat justification does not extend uniformly to all corporations." 479 U.S. at 263. The Court went on to explain the factors that differentiated the appellant from the commercial enterprises that remained bound by the statutory prohibition:

> First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

*Id.* at 263-64. The Court also cautioned, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262.

When the FEC promulgated regulations to define the outer boundaries of this exception and what it meant to be an organization "formed for the express purpose of political ideas" but not one whose "major purpose may be regarded as campaign activity," it relied explicitly on the tax status of a corporation. A "qualified nonprofit corporation" that is exempt from the prohibition on corporate independent expenditures and electioneering communications must be, among other requirements,

"described in 26 U.S.C. 501(c)(4)." 11 C.F.R. § 114.10(c)(5). In its rulemaking, the FEC explained: "Section 501(c)(4) describes a class of organizations known as social welfare organizations that are exempt from certain tax obligations. . . . A corporation must be a social welfare organization in order to be exempt from the prohibition on independent expenditures." Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,301 (July 6, 1995). The FEC reasoned that because section 501(c)(4) status permitted "a limited amount of political activity," but not so much that it becomes an organization's primary purpose, the tax status of the organization should be made a requirement to the corporate expenditure exception. *See id.*; *see also* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii), (a)(2)(i).

There is also precedent in the FEC's regulations for the permissive treatment of section 501(c)(3) organizations due to the strict political activity prohibition enforced by the IRS. As noted above, the Court in *MCFL* carved an exception only for nonprofit corporations that did not accept contributions from labor unions or business corporations. *See* 479 U.S. at 264. The FEC's definition of a "qualified nonprofit corporation" imported this concept, requiring that an organization "[d]oes not directly or indirectly accept donations of anything of value from business corporations, or labor organizations." *See* 11 C.F.R. § 114.10(c)(4). However, there was a real concern that this clause would prevent qualifying organizations from receiving grants from section 501(c)(3) organizations that do accept contributions from business corporations and labor unions. And indeed, the FEC noted that as a general matter, "if a corporation accepts donations from an organization that accepts donations from these entities, the

corporation will not be a qualified nonprofit corporation." 60 Fed. Reg. at 35,300.

In the face of this worry, the FEC made a regulatory exception for section 501(c)(3) organizations.

> However, under IRS rules, section 501(c)(4) organizations that receive funds from a section 501(c)(3) organization are required to use those funds in a way that is consistent with the section 501(c)(3) organization's exempt purpose. Since political campaign intervention is never consistent with a section 501(c)(3) organization's exempt purpose, the recipient section 501(c)(4) organization is not supposed to use the grant for campaign activity. . . . So long as these safeguards exist, the Commission will not regard a grant from a section 501(c)(3) organization to a qualified nonprofit corporation as an indirect donation from a business corporation or labor organization.

*Id.* at 35,301. The FEC explicitly relied on the restrictions inherent in section 501(c)(3) tax status to exempt those organizations from the ban on the receipt of indirect corporate contributions by a qualified nonprofit corporation. It qualified that exemption on the continued enforcement of the political campaign activity ban to prevent a loophole from developing should tax law change to remove this exemption.

Section 501(c)(3) organizations are due similar treatment under the electioneering communication restriction. As explained above, section 501(c)(3) organizations are structurally unable to air the "sham issue ads" targeted by the electioneering communication restriction; as a result, they pose no threat of either

corruption, or distortion of the political arena. Because they cannot create political committees for use as a safe harbor, the electioneering communication restriction acts as a complete prior restraint during the electioneering communication periods. The First Amendment does not permit the electioneering communication restrictions to so completely silent section 501(c)(3) organizations

*Amici* propose that when this Court crafts an as-applied constitutional exception to the electioneering communication restriction, it make clear that the provision cannot be constitutionally applied to section 501(c)(3) organizations that are barred by statute and regulation from intervening in political campaigns, so long as the following conditions are met: their tax status has been approved by the IRS; they are operating within the bounds of their tax status, and the broadcast or radio communication in question is not political campaign activity as defined by the IRS. Section 501(c)(3) organizations face a dizzying array of rules and regulations to comply with IRS requirements. For such organizations, making the bounds of the as-applied exception coterminous with the tax restrictions already in place simplifies an already too complicated regime.

In the wake of such guidance from the Court, the FEC and the IRS can easily cooperate to issue joint enforcement regulations if they deem it necessary. Indeed, both agencies are already under a statutory mandate to work together to promulgate "mutually consistent" regulations, and to report their progress annually to Congress. 2 U.S.C. § 438(f).

## CONCLUSION

*Amici*, and section 501(c)(3) organizations generally, must be able to speak and engage in constitutionally protected grassroots lobbying whenever issues erupt in Congress, even during the electioneering communication periods. Section 501(c)(3) organizations were not the target of BCRA's restriction on corporate speech, and there is no legitimate case to be made that they threaten any of the ills justifying corporate restrictions on political speech; yet despite the initial efforts of the FEC to exempt them, the broad wording of the statutory prohibition, combined with these organizations' inability to form separate segregated funds, has resulted in a complete prior restraint during most of the election year.

*Amici* urge this Court to consider the as-applied challenge in this case and find in favor of Appellee, and we support Appellee's right to conduct certain restricted lobbying activities during the electioneering communication periods. Yet the Court should also consider the special circumstances presented by section 501(c)(3) organizations. In the case before it, this Court has an opportunity to explain to the regulated community the contours of the First Amendment protections for nonprofit organizations. *Amici* urge the Court to take the occasion to grant both clarity and relief to section 501(c)(3) organizations.

Respectfully submitted,

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# APPENDIX

## ADDITIONAL INTERESTS OF AMICI

### National Organizations:

#### Alliance for Healthy Homes

The Alliance for Healthy Homes is a national, nonprofit, public interest organization working to prevent and eliminate hazards in our homes that can harm the health of children, families, and other residents. These hazards include lead, mold, carbon monoxide, radon, pests, and pesticides. The Alliance is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

#### American Conservative Union Foundation

The American Conservative Union Foundation ("ACUF") is the educational and charitable arm of the American Conservative Union ("ACU"), the nation's oldest conservative lobbying organization. ACUF created the "Conservative University," designed to place all of the classic documents and books of the conservative movement in one, central location. The mission of the Conservative University is to train the next generation of conservative leaders nationally by providing them, in a systematic, easily available and focused manner, the intellectual tools necessary to become successful political and civic leaders. It is a mission that must be advanced or the movement will die. There are many things taught to conservatives but the specific mission here is to provide a fundamental core curriculum and set of ideas that can provide a lifetime guide to political and social decision-making.

**Center for Lobbying in the Public Interest**

The Center for Lobbying in the Public Interest promotes, supports and protects nonprofit advocacy and lobbying in order to strengthen participation in our democratic society and advance charitable missions. It accomplishes this mission through strategic messaging, a national training program, targeted resources housed on its website, www.clpi.org, and co-convening of left/right coalitions to expand and defend nonprofit advocacy rights.

**Independence Institute**

The Independence Institute is a 501(c)(3) educational organization, founded in 1985. Located in Colorado, it is a state-based think tank. The Independence Institute is established upon the eternal truths of the Declaration of Independence. The Institute is a nonpartisan, nonprofit public policy research organization dedicated to providing timely information to concerned citizens, government officials, and public opinion leaders. The Independence Institute is involved in local, state, national, and international issues.

Much of the Institute's work is carried out through several Centers which are part of the Institute: the Education Policy Center, the Health Care Policy Center, the Second Amendment Project, the Center for the American Dream, the Campus Accountability Project, and the Fiscal Policy Center. The work of all these Centers often intersects with policy questions being debated by Congress.

The Independence Institute communicates with the public in a very broad variety of ways: through newspaper articles, television and radio programs, books, law review articles, presentations at scholarly conferences, legislative

testimony, e-mail, podcasts, long monographs, and shorter research papers. For many years, the Independence Institute has also communicated with the public through radio advertising, one of the communications media which is censored by the speech restrictions enacted by Congress in 2002.

Radio advertising is a very important part of the Independence Institute's educational mission. The Institute's other means of communications (such as research papers and newspaper op-eds) are certainly important, but they reach only a small fraction of the public – a relatively elite fraction that already has a high pre-existing interest in policy questions. In contrast, radio advertising allows the Institute to communicate with a much broader group of the public. Such advertising allows the Institute to share its ideas with hundreds of thousands or millions of people whom, as a practical matter, the Institute has no other capacity to reach. Significantly, radio advertising allows the Institute to present its ideas in their purest form – without the limitations (and, sometimes, distortions) of those ideas being rephrased or selectively quoted by a reporter.

The speech restrictions imposed in 2002 chill the Independence Institute's ability to communicate with the public about important federal questions during the thirty and sixty days censorship periods. The Independence Institute has no desire to advocate for the election of federal candidates (or, for that matter, state and local candidates). In twenty years, the Independence Institute has never done so. The Independence Institute has a perfect record of compliance with all federal, state, and local laws against candidate advocacy by non-profit organizations. Indeed, because the Independence Institute is founded to advance particular ideas – namely the eternal

truths of the Declaration of Independence, as applied to contemporary concerns – we will often praise a particular Congressperson one week (such as for voting against pork-barrel spending), and criticize the same Congressperson the next week (such as for supporting restrictions on a Bill of Rights freedom).

**NARAL Pro-Choice America Foundation**

NARAL Pro-Choice America Foundation's mission is to support and protect, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy.

**National Council of Jewish Women**

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide.

**National Council of Nonprofit Associations**

The National Council of Nonprofit Associations ("NCNA") is the network of state and regional nonprofit associations serving over 22,000 members in 46 states and the District of Columbia. NCNA links local organizations to a national audience through state associations and helps small and midsized nonprofits manage and lead more effectively; collaborate and exchange solutions; save money through group buying opportunities; engage in critical policy issues affecting the sector; and achieve greater impact in their communities.

**National Legal and Policy Center**

The National Legal and Policy Center ("NLPC") promotes ethics in public life through research, education and legal action. NLPC is a 501(c)(3) non-profit foundation which has played an active role in the public policy debate regarding issues affecting governmental and public accountability. In furtherance of its mission, NLPC has been asked to testify on numerous occasions before Congressional committees and has participated in public policy debates. NLPC strongly opposes restrictions which will have the effect of chilling First Amendment rights of non-profits to vigorously engage in public discussion on a wide array of issues which are being considered before Congress at any given time.

**National Low Income Housing Coalition**

The National Low Income Housing Coalition is dedicated solely to ending America's affordable housing crisis. It believes that this is achievable, that the affordable housing crisis is a problem that Americans are capable of solving. While it is concerned about the housing circumstances of all low income people, it focuses its advocacy on those with the most serious housing problems, the lowest income households.

**Violence Policy Center**

The Violence Policy Center ("VPC") is a national educational organization that engages in research and policy development to prevent firearm-related death and injury in America. The VPC regularly communicates with grassroots organizations and individuals in an effort to educate the public, policymakers and the media, and to activate support for gun violence prevention strategies.

**State Organizations:**

**California Association of Nonprofits**

With over 1,800 members, the California Association of Nonprofits ("CAN") mission is to: protect, strengthen and advance the influence, accountability and effectiveness of nonprofit organizations in a manner that builds their capacity to accomplish their missions and reserve and promote the idealism and value of nonprofit organizations in California. The California Association of nonprofits is a 501 (c) 3 public benefit corporation.

**Nonprofit Coordinating Committee of New York, Inc.**

The Nonprofit Coordinating Committee of New York, Inc., ("NPCC") is the voice and information source for New York nonprofits. Established in 1984, NPCC informs and connects nonprofit leaders, saves nonprofits money, and strengthens the nonprofit sector's relations with government. NPCC publishes a monthly newsletter, *New York Nonprofits*, offers workshops and roundtables on management issues, provides cost-saving vendor services, manages a Government Relations Committee that works on sector-wide government and legislative issues, and maintains a website loaded with information on operating a nonprofit. NPCC has more than 1,400 dues-paying members in the New York City area.

**The N.C. Center for Nonprofits**

The N.C. Center for Nonprofits is a private, 501(c)(3) nonprofit organization that serves as a statewide network for nonprofit boards and staffs, an information center on effective organizational practices, and an advocate for the nonprofit sector as a whole. It offers services directly to

all sizes and types of 501(c)(3) nonprofits, and it works closely with other local, state and national groups that assist nonprofits. It communicates regularly with its membership of more than 1,600 organizations on a wide variety of important issues.

**Housing Alliance of Pennsylvania**

Established in 1985, The Housing Alliance of Pennsylvania is a statewide membership organization working for a home within reach of every Pennsylvanian, especially those with low incomes. It conducts research, education and outreach to fulfill its mission.